

1-1-1975

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Recommended Citation

Arthur Selwyn Miller, *Implications of Watergate: Some Proposals for Cutting the Presidency Down to Size*, 2 HASTINGS CONST. L.Q. 33 (1975).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol2/iss1/3

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Implications of Watergate: Some Proposals For Cutting the Presidency Down to Size†

BY ARTHUR SELWYN MILLER*

We should like to have good rulers, but historical experience shows us that we are not likely to get them. This is why it is of such importance to design institutions which will prevent even bad rulers from causing too much damage.—Karl Popper

Introduction

Americans, as well as people throughout the world, have an extraordinary stake in the quality of their governmental institutions. All citizens share a concern that the competence and dependability of all branches of government be achieved and secured insofar as it is possible to do so. There is a deep-seated appreciation of the necessity for integrity in those occupying positions of governing power if American government is to regain and retain the confidence of the people. That confidence has been badly shaken in recent years. The Select Committee on Presidential Campaign Activities, although involved principally with the campaign of 1972, has a unique opportunity to re-evalu-

† The following essay is a memorandum submitted to the Senate Select Committee on Presidential Campaign Activities (the Watergate Committee) in early 1974. It was written in my capacity of Chief Consultant to the committee, and is published here in order to give the profession an opportunity to read one of the inputs to the committee. Readers may wish to compare it with the recommendations made by the committee in its final report issued in July, 1974.

The memorandum is published as written, without the usual impedimenta of footnotes. One addition has been made: The appendix sets out a brief argument on the need for an alternative to impeachment as a means of removing chief executives; this was not submitted to the committee. It is added to the memorandum as an afterthought setting out a problem worth serious discussion.

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ate the American political order and to suggest steps that may be taken to help recover the people's trust in their governing institutions.

These are times that test the mettle of a nation, the fiber of its people, and the durability of its institutions. For almost 200 years Americans have lived under a framework of government, conceived in 1787, and updated during the ensuing years, that save for one instance—the Civil War—has enabled them to become the strongest and wealthiest nation in history. One need not subscribe to Gladstone's fulsome praise to maintain that the men of 1787 saw clearly and built truly. They constructed a polity that, for all its shortcomings, is still the last best hope of man. The strength and the worldwide influence of the United States require that the nation take full advantage of its position to build an even better domestic structure of government; and the planet-wide responsibilities of the nation require that its institutions be fully adapted to the perils and the opportunities of the human condition.

Signs abound that the United States is now at a historic crossroads. We have run out of space, the frontier having long since vanished; there is no new earth to conquer. And we have run out of time, for social problems, both domestic and foreign, press insistently for resolutions that cannot be delayed. The bases of American institutional power in the past must be re-examined and, if necessary, redesigned to enable us to meet the challenges of the day and—of equal importance—to anticipate those of tomorrow. Decisions and choices made now—within the next few years—will of necessity guide the development of the future. Those decisions *must* be made, because even a failure to decide will itself be a decision having significant consequences.

It is in that context that the Select Committee's work should be seen; and it is against that background that the report was written. Its focus far exceeds the "third-rate burglary" called Watergate, and even the subsequent attempts to subvert the course of justice. It goes beyond improper campaign activities—"dirty tricks"—and even beyond improper campaign financing. The committee¹ considers that it is its unavoidable, indeed its bounden duty to reassess the fabric of government in the context of "Watergate"—and within the terms of its obligations under Senate Resolution 60—as best as can one senatorial committee operating under pressure of time. Recommendations must be made to the Senate that reasonably might be expected to remedy some

1. Although this article reads as though the Select Committee is speaking, no attribution should be made to it or its staff. The memorandum was drafted in that form.

of the ills directly uncovered by the committee's investigations and hearings, or that may reasonably be implied therefrom.

We are aware that our activities have caught the attention, not only of the American people, but of people throughout the world. Consequently, we know that what is said in this report and what is recommended for congressional or other action will receive widespread notice and study. In many respects the committee's hearings were an invaluable seminar conducted through television and other media by which the American people could learn about the nature of their government and profit from the disclosures of the hearings. Watergate thus has provided an unparalleled opportunity—one not likely to be repeated—for a thorough re-examination of the American government. The committee would be derelict if it failed to meet that challenge by providing its considered judgment on present-day governmental institutions and mechanisms and recommending feasible alterations. That opportunity will not soon come again.

In submitting this report to the Senate and to the American people, the committee has had the benefit of advice and study by the National Academy of Public Administration, the American Enterprise Institute for Public Policy Research, the Association of the Bar of the City of New York, the Lemberg Center for the Study of Violence at Brandeis University, the Center for the Public Financing of Elections, and the Center for Governmental Responsibility. In addition, it has benefited from individual papers submitted to the committee staff from a number of students of the constitutional order, as well as a conference conducted under the auspices of the Center for the Study of Democratic Institutions in Santa Barbara, California. These individual reports and papers have all been carefully considered in drafting this report. All statements and recommendations made herein, however, are solely those of the committee; they should not be attributed to any of the named organizations or any of the individuals who gave so freely of their time to aid the committee. That their work was done at no cost to the committee is testimony to the deep interest that Americans everywhere have in Watergate and to the sense of responsibility many have to assist in rectifying shortcomings disclosed in the hearings.

If nothing else, Watergate and accompanying events demonstrate how very far this nation falls short of realization of the ideal of the rule of law. Central to a polity created on "republican" principles but which has moved haltingly but steadily toward a more "democratic" society, the rule of law has been flouted repeatedly for many years. We have strayed far from the principle that those who wield governing

power should be limited by those external standards of judgment that Justice Oliver Wendell Holmes called law. The culmination came in Watergate, a concatenation of "horrors" that has shaken the faith of the nation and contributed greatly to deepening cynicism about the process of government.

In one sense, Watergate was an accident. Were it not for a vigilant guard who found a door (inexplicably) taped open, an unmarked police car that failed to alert the look-out for the Watergate burglars, two young, enterprising reporters for the Washington Post who assiduously and alone pursued the story for months, a forthright federal judge who perceived inadequacies in the investigation and prosecution of the Watergate burglars, and this committee, the word "Watergate" would not now evoke recollections of "Teapot Dome" and other major scandals in American history. The chairman of the Select Committee remarked during the hearings that in his judgment Watergate was a tragedy for the American people exceeded only by the Civil War. Tragedy it may be, in that it has contributed to the growing cynicism about our governing institutions and elected officials, but accident it surely was. Only by that series of listed fortuities, which in retrospect seem well-nigh incredible, did Watergate burst forth to sear the conscience of the nation. This report has been written with the clear recognition that steps must be taken to prevent future Watergates (in all their ramifications); no reliance should be placed on the accident of discoveries. Our institutions must be sufficient to the need—to "prevent even bad rulers from causing too much damage."

Summary of Hearings

On February 7, 1973, the Senate voted 77-0 to create a bipartisan investigative committee from its membership for the purpose of thoroughly inquiring into Watergate, and all the events before and after which that word came to symbolize. Almost eight months had passed since the day five burglars were arrested inside the Democratic National Committee Headquarters in the Watergate building. During that time, only one attempt had been made for the Senate to take responsibility to determine whether illegal and unethical activities had occurred during the presidential campaign of 1972. Senate Resolution 353, which would have established a commission composed of former Senator John Williams and former Supreme Court Justice Arthur Goldberg to investigate the Watergate incident and attendant events, particularly in connection with the possible misuse of campaign funds, was not acted on. (An effort in the House of Representatives by the House

Banking and Currency Committee to conduct hearings before the November elections in 1972 was effectively thwarted by the committee's own membership.)

The seven Watergate defendants were all convicted in early 1973. On February 5, 1973, Senator Sam J. Ervin, Jr. introduced Senate Resolution 60. Two days later the Senate voted unanimously to establish the committee to "conduct an investigation and study of the extent, if any, to which illegal, improper or unethical activities were engaged in by any persons acting individually or in combination with others in the presidential election of 1972, or any campaign canvass, or other activity related to it." Mandated with broad investigative responsibility and armed with the subpoena power, the committee of four Democrats and three Republicans named Samuel Dash as Chief Counsel and Staff Director, and had assembled a core staff by mid-March. The committee, under the chairmanship of Senator Ervin and with Senator Howard H. Baker, Jr. as vice-chairman, thus was operative when on March 23, 1973, convicted Watergate burglar James W. McCord wrote Judge John J. Sirica charging that perjury and obstruction of justice had been involved in the indictment and conviction of the five men originally apprehended in the burglary and the attendant conspiracy.

McCord's letter broke the wall of silence that had surrounded Watergate. It was directly instrumental in the manner in which the committee proceeded in its investigations and public hearings. Principle emphasis was to be on the Watergate burglary, its planning and subsequent coverup. Other areas, of equal importance but of somewhat lesser prominence in the public eye, were campaign espionage and sabotage, colloquially known as "dirty tricks," and campaign financing. The committee staff, divided two-thirds for the majority members and one-third for the minority, was divided into those three areas.² The teams of attorneys, investigators and researchers were augmented by expert consultants and a clerical staff. For the first time in congressional history, a computer system (at the Library of Congress) was employed for information storage and retrieval. The persistent question, with respect to the Watergate burglary, was: *Who knew what and why did it happen?* Ultimately, that question became: *How much did the President know?*

Answers were forthcoming when public hearings began on May

2. Fred Thompson was named chief counsel for the minority; James Hamilton, Terry Lenzner, and David Dorsen were selected as assistant chief counsels for the majority. Rufus Edmisten became deputy chief counsel.

17, 1973. Those hearings continued until November, 1973 and ceased in early 1974 only because the actions of grand juries and the Judiciary Committee of the House of Representatives made further public disclosures by the committee unnecessary. In all, sixty-three witnesses were heard in public session; their testimony is recorded in thirteen volumes.

During the Watergate phase of the public hearings, the committee deliberately proceeded slowly so as to build a solid foundation. This was accomplished by analyzing the organizational structure of both the White House and the Committee for the Re-election of the President (CREP). Witnesses provided a framework not only for discerning the method in which these organizations operated but also for the burglary itself.³ The testimony of Mr. Dean, and the subsequent revelation by Mr. Butterfield of secret recordings of oval office conversations, brought the name of the president, and his possible complicity, into full scrutiny. The insistent questions became: *What* did the president know and *when* did he know it?

Hearings were resumed on September 24, 1973. The final wit-

3. They were:

Robert C. Odle, Jr., office manager of CREP; Bruce A. Kehrli, special assistant to the president; Paul W. Leeper, sergeant, Metropolitan Police Department, Washington, D.C. (one of the arresting officers); John Bruce Barrett, another arresting officer of the Washington Police Department; Carl M. Schofield, a third arresting officer; James W. McCord, Jr., former assistant to Mr. Odle (and the person who "blew the whistle" by writing to Judge Sirica); John J. Caulfield, assistant director for Criminal Enforcement, Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury; Anthony Ulasewicz, retired New York City Police Department detective; Gerald Alch, former attorney for Mr. McCord; Bernard L. Barker, convicted Watergate burglar; Alfred C. Baldwin, III, the "lookout" in the Watergate burglary; Sally Harmony, former secretary to G. Gordon Liddy, counsel to CREP and the FCRP (Liddy was a convicted conspirator in the Watergate burglary); Robert A. Reisner, former administrative assistant to Jeb. S. Magruder; Hugh W. Sloan, Jr., former treasurer of FCRP; Herbert L. Porter, former director of scheduling for CREP.

They were followed by:

Maurice H. Stans, former secretary of commerce and chairman of FCRP; Jeb S. Magruder, former deputy campaign director for CREP; John W. Dean, III, former counsel to the president; John N. Mitchell, former attorney general and campaign director of CREP; Richard A. Moore, special counsel to the president; Alexander P. Butterfield, administrator of the Federal Aviation Agency and former assistant to H.R. Haldeman; Herbert W. Kalmbach, former associate finance chairman for FCRP and personal attorney to the president; Robert C. Mardian, former counsel to CREP; Gordon Strachan, former staff assistant to H.R. Haldeman; John Ehrlichman, former chief domestic advisor to the president; H.R. Haldeman, former assistant to the president; Richard Helms, former director of the Central Intelligence Agency and now American ambassador to Iran; Robert C. Cushman, Jr., Commandant, Marine Corps and former deputy director of the CIA; Vernon A. Walters, deputy director of the CIA; Patrick Gray, former acting director of the Federal Bureau of Investigation; Richard G. Kleindienst, former attorney general; and Henry E. Petersen, assistant attorney general, criminal division.

ness in the first (Watergate) phase was E. Howard Hunt, a former CIA agent and former consultant to the White House, who was in prison as a convicted Watergate conspirator.

"Dirty Tricks"

The committee then began hearings on "dirty tricks" in the presidential campaign of 1972, that being the colloquialism applied to campaign espionage and sabotage. In addition to the facts of what occurred in 1972, the committee attempted to determine the line between permissible "pranks" and overt acts of stealing and forging documents and other interferences with an opponent's strategies. It became obvious that it is difficult indeed to draw the line between what is proper and ethical and what is not, and between practical but clean politics and "dirty politics".⁴

Campaign Financing

The final phase of public hearings centered on campaign financing, primarily upon illegal corporate contributions and the circumstances under which they were given. The misuse of political influence in the granting of program funds and federal jobs in return for political contributions was also investigated.⁵

4. The following witnesses testified on political activities:

Patrick J. Buchanan, special consultant to the president; Donald H. Segretti, former employee of CREP; Martin D. Kelly, employed by Mr. Segretti; John R. Buckley, former director of Inspection Division, Office of Economic Opportunity; Michael W. McMinoway, employed by CREP; Frederick J. Taugher, former coordinator of the southern California campaign for Senator McGovern; Gary Hickman, lieutenant, Los Angeles Police Department; Richard G. Stearns, former western region campaign director for Senator McGovern; Frank Mankiewicz, former political director for Senator McGovern; Marc Lackritz, SCOPCA staff; Berl Bernhard, former campaign manager for Senator Muskie; Clark Macgregor, former director of CREP; Truman F. Campbell, chairman of the Republican Central Committee of Fresno County, California; Michael Heller, student at Mt. Hood Community College, Gresham, Oregon; Paul Brindze, student at the University of California at Los Angeles; Tim Lee Carter, member of Congress for the fifth district of Kentucky, delegate to the 1972 Republican National Convention and member of the platform Committee; and Jeremiah P. Sullivan, police superintendent, Boston, Massachusetts.

5. Testimony was heard from the following eleven witnesses, beginning on November 7 and ending on November 15:

William H. Marumoto, a former White House employee; John J. Priestes, building contractor from Coral Gables, Florida; Benjamin Fernandez, former organizer of the National Hispanic Finance Committee for the Re-election of the President; Matthew E. Clark, Jr., director of purchasing for the American Shipbuilding Co.; Robert Bartlome, secretary of the American Shipbuilding Co.; Orin E. Atkins, chairman of the board, Ashland Oil, Inc.; Claude C. Wilde, Jr., vice president of Gulf Oil Corp.; Camili Fabrega, regional vice-president for Braniff Airways; Neal Robinson, assistant treasurer of Braniff Airways; George A. Spater, former chairman and chief executive officer of American Airlines; and Russell DeYoung, chairman of the board and chief executive officer of Goodyear Tire and Rubber Co.

Parallel Activities

Tangential Investigations

The three major segments of the committee's investigations unavoidably led into a number of peripheral investigations which, because of time limitations, did not get aired publicly. These investigations, not aired in a public forum because of the rapid flow of events which moved the centers for action into the courts and the House Judiciary Committee, dealt mainly with "dirty tricks", campaign financing and possible CIA involvement. Investigations continued after hearings ceased, ending in March, 1974. The results of those investigations are published in the hearings.

Litigation

Almost continuously since it began its public hearings, the committee was involved in a series of lawsuits. The first was the attempt in June, 1973 by the special prosecutor, Archibald Cox, to have the committee's hearings postponed until after the grand jury's work had been completed. That effort by Mr. Cox failed.

The disclosure by Mr. Butterfield on July 16, 1973, that the president had recorded conversations in the oval office, his Executive Office Building office, and several telephones led to an attempt to get the recordings through a written request. When that was rejected by the president, two subpoenas were issued to the president for the tape recordings and for certain White House documents. That historically unprecedented action (subpoenaing the president) triggered litigation that continues at the time of writing this report. The committee voted in open session to sue in federal district court in Washington to get the tapes. At about the same time the special prosecutor also subpoenaed some tape recordings.

Mr. Cox's move to enforce grand jury subpoenas was decided by Judge John J. Sirica in favor of the special prosecutor, whereupon the president appealed. Judge Sirica was upheld by the court of appeals, after which several tapes (two were missing) were produced for the special prosecutor.

Unlike Mr. Cox's case, which was based on the federal rules of criminal procedure and which did not involve separation of powers problems, the committee's suit had to be brought under the federal rules of civil procedure. After hearing oral argument on the committee's motion for summary judgment, on October 14, Judge Sirica held that his court lacked jurisdiction to entertain the suit. That decision

was appealed by the committee, and the appeal was accompanied by action in the Senate (and later the House) to enact a special bill giving the district court jurisdiction to enforce committee subpoenas. S. 2641 became law on December 17, 1973.

Subsequent motions by committee lawyers to enforce the two subpoenas led to a decision on February 8, 1974, by Judge Gerhard Gesell to dismiss the suit. That decision was upheld by the court of appeals in May, 1974.

Other Activities

Beginning in May, 1973, members of the committee staff solicited comment from approximately 150 students of the political and constitutional order on the larger implications of the committee's investigations. In addition, several organizations were asked to furnish the committee with their evaluation of: (a) the key issues or questions brought out by the committee and (b) alternatives of action that the committee might consider in writing its report. Thoughtful statements were received from a number of individual scholars. Of particular help were studies produced by the American Enterprise Institute for Public Policy Research and the National Academy of Public Administration.

While the outside input has proved to be of great help to the committee in completing its work, the committee at all times reserved judgment about individual suggestions and points of view. This aspect of the committee work was accomplished at no cost to the taxpayer; the members of the Select Committee wish to express their gratitude to the organizations and individuals who gave so freely and selflessly of their time, and also to the Ford Foundation which helped to defray the expenses of the American Enterprise Institute and of the National Academy of Public Administration (the latter organization was also financially aided by a grant from the John D. Rockefeller III Fund, for which the committee is grateful).

Summary

The intense public interest in the activities of the Select Committee was evidenced by the more than 240 news representatives who appeared to cover the public sessions and the nation-wide television and radio coverage given the hearings. That the interest in Watergate was not limited only to the United States was shown by the number of reporters from European and other countries who covered the hearings, as well as by the time given on radio and television in such countries

as Canada, the United Kingdom, West Germany, and the Netherlands. All in all, then, it is fair to say that the hearings were an informal seminar that has proved to be an extraordinarily valuable educational vehicle in the inner operations of the American government, with special ordinarily valuable educational vehicle. Immeasurable though they may be, the educational benefits are among the most important aspects of the committee's work. Never before in American history have the day-to-day operations of the most powerful governmental office in the world been held up to such intense public scrutiny.

One consequence is to be deplored: the weakening of the confidence of the American people in the people and the institutions who govern them. That is both one of the prices that unavoidably had to be paid for exposing the cancer known as Watergate that had grown upon the governmental structure *and* a challenge to this committee to produce recommendations that are at once desirable and feasible for remedying Watergate and helping to regain public confidence.

That challenge is the subject of this memorandum. First, however, it is desirable to set the problem in some perspective.

The Context of Watergate

To place Watergate and attendant matters in proper perspective, it is desirable to discuss briefly the social, political, and historical context in which the episode arose. An initial inquiry is into the question of whether Watergate is to be seen as an aberration or as a culmination of historical developments. The committee did not study the question in depth, but enough data are available in the public record to be able to make some preliminary conclusions. This is necessary because if Watergate is considered to be unique and not likely to be repeated in the future, then only a set of relatively minor committee recommendations are necessary. On the other hand, if it is considered the culmination or extension of known historical trends that reached a peak and a temporary cessation in Watergate but which may well be repeated in other forms by future governmental leaders, then other, more extensive recommendations are required.

The deviations from proper behavior disclosed by the committee's hearings (and other events) must be regarded as both aberrational *and* an extension of trends that have been evident for many years. Seen as aberration, Watergate may be perceived as the result of bringing into positions of immense governmental power individuals whose basic loyalties ran to the leader (the president) rather than to the people or

to law. Enough guilty pleas of those individuals have already been received to buttress that conclusion. Ideological loyalty was the overriding concern.

At the same time, Watergate evidences defects in the system itself. There are enough data on the public record to suggest that some, even most, of the improper practices have been growing gradually for several decades (some, indeed, run back to the very beginnings of the republic). Among these trends are: excessive secrecy (including use of executive privilege); reliance on "national security" as an excuse for extraconstitutional action; use of the public administration to reward friends and punish opponents ("enemies"); the politicization of the governmental service, particularly the Department of Justice; seeking political contributions from private interests with implicit (or explicit) assurances of support or favor (or the absence of disfavor); and "dirty tricks" generally.

Thus seen, Watergate, far from being an isolated incident that can be treated as a discrete criminal law matter, requires that attention be devoted to the very system itself in order to determine where and how it may be improved.

This is not to say that the "system" is not working at the present time. Indeed it is. The activities of the Select Committee, the action of the House Committee on the Judiciary, the work of the special prosecutor's office, actions by the courts—all these, and more, show that once "Watergate" had been exposed, the system was adequate to the immediate need of dealing with the derelictions of that burglary and attendant events. Exposure of Watergate may well have been an accident, as was said above, but from the accumulated testimony heard by the Select Committee, plus other matters on public record, it is obvious that sooner or later something would have occurred to indicate what was taking place within government. So the paradox remains: the "system" is working, but it needs improvement.

There are, furthermore, certain historical trends outside of Watergate that must be taken into consideration in any evaluation of it and in making recommendations. Included are:

1. *The fundamental change in the nature of government that has occurred over the past four decades.* The change has taken place, without constitutional amendment, by legislation validated by the Supreme Court and by custom and usage (mainly the extra-constitutional exercise of power by the executive).

The net result is the rise of the "administrative state," a govern-

ment which has assumed obligations toward the body politic that far exceed any prior to 1933.

The Constitution has become one of (affirmative) powers as much or more than one of (negative) limitations—which was the theory prior to the 1930's.

Within the structure of modern government, the following factors are noteworthy:

- Decline of the states
- Decline of the congress
- Aggrandizement of executive power
- Rise of political parties (an extra-constitutional development) so as to make them part of the governing process.

2. *The "administrative state" is the "interventionist" state.* Government has assumed the obligation of furthering the economic well-being of the American people (the basic statute is the Employment Act of 1946); this is a commitment to enhance the "quantity of American life."

At the same time, government has assumed obligations under the National Environmental Policy Act of 1969 to further the "quality of life."

That these goals may be, and often are, in conflict does not gain-say the fact that government is deeply immersed in all aspects of American life. These types of intervention into socio-economic matters have been legitimized by a series of Supreme Court decisions, particularly in the post-1937 period.

3. *The United States has planet-wide interests.* "Watergate" is not a peculiarly American problem. People everywhere have an interest in the nature of the United States government. All the world is dependent upon the trustworthiness of the American president.

Furthermore, the interdependence of world problems, highlighted by the energy crisis, requires that serious attention be accorded to the expectations of other nations.

4. *The task of government is to take an active and influential part in the management and allocation of a finite amount of resources.* The view that resources are finite, and perhaps will soon not be available, is something new for this country.

5. *The movement toward equality.* Long recognized, at least as far back as de'Tocqueville, the equality drive encompasses both status and wealth. Furthermore, it has both a domestic and a foreign dimen-

sion—the latter in the demands being made by the third world.

6. *The need for presidential leadership.* There can be no dispute that modern government in this country, as well as elsewhere, must be based on a strong executive. The tasks of government outlined above simply require that Congress, at best, can set general guidelines, with the chief executive exercising considerable discretion over the administration of public policies. At the same time, some better means of checking the executive must be found.

7. *The fundamental problem.* How to make power that is necessary to carry out the assumed obligations of government as decent and tolerable—as “accountable”—as possible. Wherever governmental power is exercised, it is necessary (a) to cabin it within reasonable limits and (b) to permit it to accomplish its urgent tasks. This can only be done by perceiving the actual—in Bryce’s term, the “practical”—Constitution and to distinguish it from the formal.

The Constitution of 1787 separated governmental powers both to prevent despotism and to promote efficiency. Almost nineteen decades later, the historical separation has been warped by an aggrandizement of power in the executive with a consequent diminution of legislative power. In many respects, Watergate evidences the imbalances that have resulted from that fundamental change in the “practical” Constitution. It is the task of this committee to attempt to rectify the shortcomings of that development, without at the same time weakening the manner in which our governmental institutions may act and react to the problems and crises of the age.

Recommendations

Watergate has demonstrated to even the most casual observer that the constitutional system in some respects is badly awry. A troubling amount of power has become concentrated in the presidency. Developments throughout our history have led to that aggrandizement of powers. A consequence is a substantially weakened Congress.

It is not that the president acquired his added powers without good reasons—or, for that matter, without the acquiescence of the Congress. All too often, Congress has been quick to delegate large amounts of governing power to the chief executive and to the public administration generally. Other powers have come to the president through “constitutional adverse possession,” by movements to fill vacuums in governing authority.

Simultaneously—particularly during the past three decades—the

position of the executive offices of the presidency has greatly increased. White House staffs have swollen to proportions far in excess of anything in the past. A consequence is the reduction of the independent powers of cabinet members and of the heads of other agencies. The movement has been toward centralized control over the entire executive branch.

This development within the "practical" Constitution clearly suggests a need for a re-examination of the basic premises of the separation of powers doctrine.

To Madison, the doctrine of separation of powers was the "sacred maxim of free government," designed to guard against concentration of the power of governance in the same hands—"the very definition of tyranny." That view has had general acceptance since Madison wrote *Federalist* No. 47; echoed, for example, by Justice Brandeis in the *Myers* case and shortly thereafter by Justice Sutherland. It is the core of Justice Black's opinion for the Supreme Court in the *Steel Seizure Case* and has been repeated for different reasons by both congressional committees (principally the Senate's Subcommittee on Separation of Powers) and by President Nixon's attorneys in the cases brought by Special Prosecutor Archibald Cox and the Select Committee to enforce subpoenas against the president.

That ancient doctrine must now be reassessed in the light of its history and in the context of the demands made upon government in the modern era. A word is in order, first, about the term itself: (a) it is not a "doctrine" but a theory; in other words, it provides a framework for analysis rather than a set of interdictory rules; and (b) it is a misnomer, for "powers" are not actually "separated" by the American Constitution; that instrument establishes separate institutions sharing power—a quite another and, indeed, a fundamental distinction.

Nevertheless, the familiar term is used as shorthand for a fairly complicated and, oddly, given the legalistic bent in this country, a too-little analyzed principle. The net conclusion is multiple, stated briefly here: separation of powers was developed for reasons in addition to the protection against tyranny; cooperation, not conflict, has been the norm of interaction between the branches; there have been major realignments of actual power within the framework of government created in 1787; and the need is becoming acute for radical surgery if the goals of the doctrine are to be attained.

Those who take a filio-pietistic view of the framers of the Constitution may believe that the political (that is, constitutional) theory of separation of powers was invented by the fifty-five men who sat in Phil-

adelphia that hot summer of 1787 or by their alleged intellectual mentor, Charles Secondat, Baron de Montesquieu. But that is not true. It bears some resemblance to, but is not the same as, the "mixed constitution" well known to the ancient Greeks. Prominent in Plato's *Laws* and Aristotle's *Politics*, the theory of the mixed constitution was perhaps most clearly enunciated by Polybius, the Greek historian whose mixture of monarchy, aristocracy, and democracy had its greatest influence in Rome. Not until the late middle ages did separation of powers appear in the literature in anything like its modern form. But there is obvious overlap between the two theories. Both are concerned with achieving liberty under law; both are based on a conception that concentration of power means tyranny; and both appear to be predicated on a view of mankind as essentially irrational. "The theme of man's irrationality" during the seventeenth and eighteenth centuries, Arthur O. Lovejoy maintained, "and especially of his inner corruption was no longer a specialty of divines; it became for a time one of the favorite topics of secular literature."

Political theorists, European and American, thus came to emphasize the dangers rather than the advantages of government. If man was depraved and antisocial, he then required control; but those who controlled, themselves human beings, would mercilessly exploit their subjects unless there were some way to limit their power. Lord Acton's famous aphorism about the corrupting aspects of power simply restated some familiar learning of the seventeenth and eighteenth centuries. As Madison put it:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Madison, however, saw matters somewhat differently from other prominent framers of the Constitution. Efficiency was stressed as a principal reason for establishing an executive independent from the legislature by, among others, John Adams, Thomas Jefferson, John Jay,

and James Wilson. Jefferson clearly perceived that the absence of a division of governmental powers resulted in ineffectual executive action. He was as much or more concerned about the harm resulting from legislative dominance over the executive as he was about possible harm that might occur to Americans' liberties. James Wilson's views are particularly apposite:

In planning, forming, and arranging laws deliberation is always becoming, and always useful. But in the active scenes of government, there are emergencies, in which the man, as, in other cases, the woman, who deliberates, is lost. But, can either secrecy or dispatch be expected when, to every enterprise, mutual communication, mutual consultation, and mutual agreement among men, perhaps of discordant views, of discordant tempers and of discordant interests, are indispensably necessary? How much time will be consumed! and when it is consumed; how little business will be done! . . . If, on the other hand, the executive power of government is placed in the hands of one person, is there not reason to expect, in his plans and conduct, promptitude, activity, firmness, consistency, and energy?

Under the Articles of Confederation, government was seriously faulty because powers were not separated, which resulted in ineffectual governmental activity.

The two conceptions, quite obviously, are not consistent, either in philosophy or in application. As noted, the orthodox notion is based on a conception of man as essentially so evil in nature that he is likely to use governmental power contrary to the common interest unless institutionally prevented from doing so. On the other hand, the efficiency version appears to be predicated on a view, set out, for example, by Carl Becker in *The Heavenly City of the Eighteenth Century Philosophers*, that man is not naturally depraved and that he "is capable, guided solely by the light of reason and experience, of perfecting the good life on earth." Both versions have had currency throughout American history, one as official doctrine, the other as actual practice.

Despite assertions to the contrary, the efficiency version has been dominant throughout American constitutional history. Separation of powers has never been a barrier to a high level of cooperation between the political branches of government—a situation that, speaking generally, has found judicial acceptance—illustrated, for example, by the lonely examples of the only two cases in which the Supreme Court ever struck down delegations of legislative power to federal agencies and by the *Steel Seizure Case*, the most important instance of judicial disapproval of executive action. As Willard Hurst has shown, both the federal and state governments, aided by the judiciaries, cooperated in

the exploitation of the virgin continent during the nineteenth century. In this century, the closing of the frontier has not altered the posture of cooperation. Woodrow Wilson put it well in 1908, when he stated in his classic *Constitutional Government* that "warfare" between the branches could be "fatal" to the constitutional order.

The norm of cooperation is too little recognized in the legal profession and among commentators, who tend to emphasize conflict rather than cooperation. Just as in law the Holmesian notion of the "bad man" tends to dominate rather than H.L.A. Hart's "good man" theory, so too in our study of the American Constitution there is a tendency to look for the tensions and disputes. We tend, also, to engage in what Franz Neumann called "constitutional fetishism"—the attribution of political consequences, such as individualism and personal liberty, "to isolated constitutional arrangements which have meaning only in a total cultural, and particularly social, setting."

Cooperation as the norm could scarcely be otherwise. If government is to function, there must be at least a tacit agreement, if not express recognition, among the leaders of all the departments that their duty is to keep the ship of state on its way and not permit it to get bogged down in the mud of continuous controversy. This is not to say that government accomplishes its tasks well or effectively; the contrary all too often is true. But it is to say that insofar as government functions are concerned, separated powers are not now, and never were, a barrier of any consequence to getting necessary social results accomplished. Neumann puts it somewhat differently: "The (classical) liberal state, supposedly condemned to play the role of the night watchman, was exactly as strong as it needed to be in order to fulfill its domestic and foreign political tasks." To state it in still another way, social and political change—what some call progress—can come about only by moves in concert by the three branches. That there has been massive change in the actual allocation of powers within the national government is, of course, wholly truistic. Constitutional change at the level of effective control over public policy has resulted from agreement, tacit or express, among the three powers.

Within the United States, the allocation of formal constitutional powers has remained the same since 1787. The few amendments that have been added do nothing to alter the historical structure. But as Woodrow Wilson said, "The Constitution is in operation manifestly a very different thing from the Constitution of the books." It is, accordingly, a task of those who discuss the nature of the constitutional order to delve below the facade and determine the reality beneath it, not al-

lowing themselves to be confused by reference to any supposed intention of the framers of the fundamental law.

Plumb beneath the surface of constitutional formalism and one soon finds at least two bedrock principles: (a) political institutions may be outwardly balanced but social forces normally are not; and (b) the ostensible balance of political power hides the steady accretion of power in the executive. The first principle requires no present exposition.

There is an apparently irreversible alteration of American government toward executive hegemony. No serious observer disputes the rise of presidential government, however much he may decry it and illustrate its potential for danger. It is enough to underscore the point that the change in fact, as opposed to fundamentalist constitutional theory, came about by the ready and long-continued acquiescence of Congress, accompanied by the Supreme Court's well-nigh complete refusal or inability to stay the course of constitutional change. The net result has been, in the words of Amaury de Riencourt, that the president today "wears ten hats—as Head of State, Chief Executive, Minister of Foreign Affairs, Chief Legislator, Head of the Party, Tribune of the People, Ultimate Arbiter of Social Justice, Guardian of Economic Prosperity, and World Leader of Western Civilization." To that might be added that the president is also the Chief Law Enforcer, a power, as recent events have demonstrated, that is itself of considerable import. Those eleven hats, balanced somewhat precariously on the head of one man, have had the concomitant result of an exponential expansion of the E.O.P.—the Executive Offices of the President. The culmination of almost 200 years of constitutional history is a swollen presidency—both in its personal sense of the monarchical character of the chief executive and its institutional sense of the several thousand bureaucrats, high and low, who man the E.O.P.

The analog of aggrandized presidential power is, of course, diminished legislative and judicial powers. (And also, be it said, of the powers of the several states—but that is a separate problem.) A strong presidency, as it has evolved, means a sapless Congress and a judiciary, so far as the actual control of governance is concerned, whose powers are more ostensible than real. However one views the executive, then, whether as chief executive sitting atop the pinnacle of the public administration or as a set of feudalities in a far from monolithic structure, there can be no dispute over the answer to the question of where most of the power of governance lies in the tripartite system.

Why this development has occurred is not susceptible of easy answer. Certainly it has not been because of conspiracy to take over government by a sort of silent and continuing *coup d'etat*. Neither has it been caused by the Supreme Court (although some scholars who should know better attribute an extremely high degree of power to that tribunal) nor by Congress, save by legislative acts that have delegated enormous chunks of governing power to the bureaucracy and by legislative inaction. Congress has by and large remained silent while the reality beneath the constitutional facade altered. Change has been a primary characteristic of the Constitution of 1787; but as Ernest Nagel has shown, there is no simple and at the same time adequate explanation of any social phenomenon, including the fact of constitutional change.

Surely the causes are multiple. It is too simplistic, perhaps, for Neumann to assert that "the higher the state of technological development, the greater the concentration of political power," a sentiment that finds a counterpart in Galbraith's statement that it is "technological imperatives" that demand the giant business corporation. But there may be at least a kernel of truth in the proposition. The scientific-technological revolution has paralleled the rise of presidential government. The causal relationship between the two is *terra incognita* in constitutional theory. Technological determinism bears at least a faint resemblance to Max Weber's famous hypothesis about the relationship between Protestantism and the rise of capitalism. As a hypothesis, rather than as dogma, there is little to quarrel about in Weber's formulation. The same may be said for Neumann's. In sum, as Frederick Jackson Turner put it, "Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions." Among those vital forces must be listed the new technology.

With that indisputable state of affairs as background, it is a necessary implication from the committee's hearings (and other activities) that there is no effective instrument to impose accountability upon the swollen presidency. The historical system of checks and balances has proved to be at least partially inadequate. Something new is needed, something that will include measures that at once will permit presidential leadership in government and provide some accountability of that leadership (and power) short of the quadrennial ballot and the blunderbuss of impeachment. It is with that pressing requirement in mind that the following recommendations are made, not with the idea that they exhaust all of the possibilities for action, but rather with the

hope that they will provide a framework for thought and action about rectifying some of the manifest shortcomings in our governmental structure.

Recommendation No. 1

The Congress should take appropriate action to clarify the meaning of "national security", establish its legitimate uses, and promulgate guidelines for its future application.

Discussion: The term "national security" has become an all-encompassing justification for a variety of government actions, particularly by the executive. The committee heard testimony in which the burglary of Daniel Ellsberg's psychiatrist's office was predicated on an undefined concept of national security. Such an episode clearly indicates the pressing need for clarification of the meaning to this concept and establishment of guidelines for its use.

Although not unique to the Nixon administration, the use of national security to justify actions is of relatively recent origin. It was seldom employed before the advent of the cold war. It is at best an ambiguous term, one that permits the widest discretion in those who invoke it as a justification for taking certain actions. Indeed, to the knowledge of this committee, it has never been defined by any governmental body. At issue, furthermore, is the scope of its permissible use and by whom the decision on national security are to be made. This recommendation addresses each of these problems.

First, as to who may decide national security issues: the committee is firmly of the opinion that Congress must assert its constitutional *duty* (as compared with lawful authority) to participate in making national security decisions. It can best do that by clarifying the meaning of the term and enacting standards as to when it may be used. Ultimately, the decisions on national security, insofar as detail is concerned, are executive in nature. (With respect to the national security apparatus—including such organizations as the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Council, and the National Intelligence Advisory Board, as well as the departments of Defense and State—most or all of these have been drawn in one way or another into the Watergate net. See Recommendation No. 2).

In the name of "national security," what is acceptable governmental (including executive) behavior and what is not? What is legitimate and what is not? Do different rules or norms apply in the conduct of external affairs as compared with domestic matters? Before

attempting to suggest some ways of analyzing those difficult questions, it is desirable to develop the nature of the problem.

A former assistant to Henry Kissinger recently stated:

Only a tiny minority of true believers remains to be persuaded that Watergate represents anything other than a serious disease in our body politic. We can and do take considerable comfort in the fact that the 'system'—by which we refer to the persistent and frequently courageous activities of the press, the judiciary, some parts of the executive, and, to a lesser degree, the legislature—has shown itself willing to resist enormous executive pressure to keep the truth hidden. But we cannot turn our backs on the very obvious fact that something staggering in scope and import happened. Watergate was not a minor event, certainly not a 'foolishness'. It remains in all its ramifications the most dangerous assault from within on the fundamentals of our democratic way that this nation has yet experienced. And it has been justified, defended, and *even made possible* by appealing to 'national security' and by use of elements of the 'national security' apparatus. Yet no one has given a highly skeptical public an acceptable and persuasive reading of just what the 'national security' threat fully consisted . . .

. . . 'National security' can hardly justify the tapping of the telephone of a presidential speechwriter whose writ quite simply did not extend to full access to sensitive foreign policy matters. Nor does it excuse tapping former National Security Council aides after they have left the White House and therefore are no longer privy to matters of highest secrecy. Certainly it does not include eavesdropping on lawyers concerned with domestic affairs in the White House, nor, one would hope, breaking into doctors' offices.

But this is just the trouble. Without any reasonable rules of the game, accepted by all, any president and any administration have a latitude for potential mischief that is anything but healthy. *Faced with such imprecision, Congress has fallen down badly, and largely acquiesced in the mystique of the 'national security' argument in fashion supine.* (Emphasis added)

Much like the due process clauses of the Constitution, the term defies definition. It cannot be encapsulated into a brief statement, a clearly worded formula for now and the future. At best, what must be done are attempts to grapple with the legitimacy and illegitimacy of acts taken in the name of "national security." By pursuing the objective of developing a conceptual framework that will at once protect legitimate executive requirements, meet with legislative approval, stand up to judicial challenge, and, finally, win general public approval, the Congress can move toward a workable definition.

The issue is urgent, one that necessitates the broadest possible national dialogue and debate. To that end, the Select Committee further recommends:

1. Continuing congressional hearings on the subject, by one or more standing committees or subcommittees. A model for this might be the Subcommittee on National Policy Machinery, chaired by Senator Henry Jackson. The Joint Economic Committee could also serve as a model.

2. Establishment by Congress of a national commission, both to study the subject and also to interact with academic centers, policy institutes, and various public interest voluntary associations.

3. An examination of the "national security" role of Congress, toward a more adversarial posture vis-a-vis the executive. Rather than docilely following along when the executive speaks of national security, Congress should assume the role of "devil's advocate" or at least of a "loyal opposition," so that past, present, and proposed public policies are given the most searching scrutiny and analysis.

Recognizably, much of what travels under the banner of national security also is considered to be secret. The propensity of the executive—of any bureaucracy—toward secrecy, even excessive secrecy, is only too well-known. But that tendency, (which is the subject of Recommendation No. 4 below) should not be permitted to stand in the way of facing the urgent problem of defining the acceptable parameters of the concept of national security, its use, and who under the American constitutional order should invoke it. The recommendations set forth above will lead toward accomplishing that goal.

Recommendation No. 2

A joint congressional committee should be established to oversee the activities of the intelligence and law-enforcement "community".

Discussion: It is a clear inference from testimony heard by the Select Committee that the intelligence and law-enforcement "community" is not being adequately supervised—either by the executive or, much more importantly, by the Congress. This situation is not a new one. It has come before the Senate before. As long ago as 1966, the Senate considered S. 2815, introduced by Senator Young of Ohio, a bill to establish a joint congressional committee "to make a continuing study and investigation of the activities and operations of the Central Intelligence Agency." (Cong. Rec., Jan. 24, 1966, p. 952, remarks of Sen. Young). That bill was followed by the Senate Foreign Relations Committee's approval of a resolution in May, 1966, by Senator Fulbright of Arkansas, to create a Senate Committee on Intelligence Operations. That resolution was disapproved by the Senate in

July, 1966. The conclusions and recommendations of the Committee on Foreign Relations (as contained in Report No. 1371, 89th Congress, 2d Session, July 14, 1966) are apposite:

It should be emphasized that Senate Resolution 283 does not provide for an independent investigation of U.S. Government intelligence activities. On the contrary, its primary effect is to formalize existing informal arrangements by which some members of the Committee on Armed Services and the Appropriations Committee have been privy to Central Intelligence Agency activities and to add to that group three members from the Committee on Foreign Relations. A secondary effect is to provide the Senate with an instrument to deal with the entire intelligence community—something which is not now done by Congress at all.

There is no need to review here the publicized cases in which the Central Intelligence Agency has been involved in recent years. It has become apparent, however, that the Central Intelligence Agency has engaged in many types of activities which were not contemplated when it was created. These activities, in some instances, have had serious implications for U.S. foreign policy. And yet, under existing practice, the Director of the Central Intelligence Agency has not felt he was authorized to give the Committee on Foreign Relations information which it has felt was important in the discharge of its duties in the field of foreign policy.

As a matter of principle, the Committee on Foreign Relations believes selected members should be in a position to receive information regarding Central Intelligence Agency activities which influence our foreign relations with other countries and which could mean the difference between war and peace. It seems appropriate, therefore, not only that the Senate's relationship to the Central Intelligence Agency be formalized but that the Senate's Committee on Foreign Relations have equal representation with the Committees on Armed Services and Appropriations in connection with oversight of Central Intelligence Agency operations.

Senate Resolution 283 is designed to accomplish this purpose. It is the most moderate proposal on this subject which has been submitted to the Congress in recent years and one which should be acceptable to the Senate. It is not intended to reflect in any way on any Members or committees of the Senate or on the employees of the Central Intelligence Agency. Indeed, a formal committee of the type proposed should protect the CIA from uninformed public criticism by providing a more formal arrangement for Senate oversight. As is pointed out above, however, the primary purpose of the resolution is to permit three members of the Committee on Foreign Relations to participate in the deliberations of the existing informal group and, hopefully, to contribute some worthwhile suggestions regarding the activities and operations of the intelligence community. In the opinion of the 14 members of the Committee on Foreign Relations who voted to report this resolution, it is certainly not too much to ask—indeed, it is in the national interest that three members of that committee, which is charged with the responsibility for advising the Senate on foreign

policy matters, have access to the same information that is given to certain members of the Committees on Appropriations and Armed Services. Accordingly, it is recommended that the Senate approve the pending resolution at an early date.

The Select Committee is aware also of Senate Report No. 93-466, 93rd Congress, 1st Session, Oct. 12, 1973, entitled "Questions Related to Secret and Confidential Documents," rendered by the Special Committee to Study Questions Related to Secret and Confidential Government Documents. Although Report 93-466 deals with secrecy, which is the subject of Recommendation No. 4, below, the last three paragraphs of its recommendations are relevant (p. 16 of the report):

III. At the request of Senator Cranston, the Committee discussed providing the Senate the overall sums requested for each separate intelligence agency. The release of such sums would provide members with the minimal information they should have about our intelligence operations. Such information would also end the practice of inflating certain budget figures so as to hide intelligence costs, and would insure that all members will know the true cost of each budget item they must vote upon.

Accordingly, the Committee recommends that the Appropriations Committee itemize in the Defense Department Appropriations bill the total sums proposed to be appropriated for intelligence activities by each of the following agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office and any separate intelligence units within the Army, Navy, and Air Force. The Committee does not request that any line items be revealed.

The Committee also recommends that the committee reports indicate the total number of personnel to be employed by each of the above agencies. The Committee does not request any information about their duties.

Of particular importance is the fact that, to the knowledge of this Select Committee, the reference to the National Reconnaissance Office is the *only* public acknowledgment of such an organization. It is manifest that the Congress generally, and the public not at all, does not have adequate knowledge of the funding or *even of the existence of* certain intelligence agencies. For example, there appears to be no evaluation of the duties or responsibilities of the Foreign Intelligence Advisory Board within the executive offices of the president and of the board's relationship to the CIA and other intelligence agencies.

It is clear beyond peradventure, accordingly, that steps must be taken by the Congress to insure that adequate oversight of segments of the intelligence community is accomplished. Of particular importance, in the light of testimony by E. Howard Hunt and by officers of the CIA, is the extent to which the CIA is, or should be, authorized

to take action to protect the sources and methods of collection of intelligence data. The joint committee, if established, should inquire into the extent to which that responsibility of the CIA conflicts with the statutory mandate that it undertake no domestic security functions.

The Select Committee recognizes the extraordinary importance and delicacy of both intelligence and law enforcement functions of government, but believes that a joint committee modeled on the Joint Committee on Atomic Energy (which also is concerned with data of the highest importance) would go far toward rectifying what may well be an uncontrolled intelligence function of government. As for law enforcement, testimony of the former acting director of the Federal Bureau of Investigation, Patrick Gray, as well as other information publicly known, indicates that similar oversight functions should be performed over the FBI and similar agencies. The joint committee, if established, could include that as one of its primary objectives.

Recommendation No. 3

An office of "congressional counsel" should be established to provide legal advice and advocacy for Congress, its committees and subcommittees, and individual members of Congress acting in their official capacity. Further, jurisdictional statutes should be amended so as to enable suits by Congress and/or its membership and committees, without regard to problems of "jurisdictional amount" and other requirements for other litigants.

Discussion: During recent years a number of controversies between Congress and the executive have made it manifest that Congress needs a permanent legal staff to protect its interests in the courts and administrative tribunals. Included are the following issues: the pocket veto power of the president, impoundment by the president of appropriated funds, executive privilege, and suits against Congress or its members (for example, *Powell v. McCormack* and *United States v. Gravel*). During the hearings of the Select Committee, the problem became particularly acute when lawyers on the staff of the committee had to be diverted from investigative duties to litigate the committee's case against the president for the production of subpoenaed tape recordings. In addition, the committee, under a ruling by Judge John Sirica, found that it did not come within the jurisdictional provisions of the United States Code in its suit against the president. This necessitated passage of an extraordinary, one time (for the Select Committee) statute permitting the district courts of the District of Columbia to assume jurisdiction in such litigation.

It has, accordingly, become quite clear that Congress cannot rely upon the Department of Justice to protect its valid interests in the courts and administrative tribunals. Nor does Congress now have the requisite staff facilities. What is needed within the legislative branch is an office, modeled perhaps on the office of the solicitor general, manned by top flight lawyers who would both augment the existing services of the Congressional Research Service and serve as a "lawyer for Congress." In this connection, the committee notes the introduction of S. 2615 by Senator Vance Hartke in October, 1973, and approves it in principle. The Select Committee, in addition, adopts the thrust and tenor of the remarks of Senator Hartke made when he introduced S. 2615 (see Congressional Record, Friday, October 26, 1973, pp. S. 19489-92), without necessarily subscribing to every statement made therein.

Finally, so as to obviate any possibility of Congress, any of its committees or subcommittees, or its members being denied access to the federal courts because of jurisdictional or other procedural grounds, the Select Committee believes it is necessary to enact into permanent legislation the bill (Public Law 93-190) under which the district courts in the District of Columbia were permitted to hear the committee's suit for presidential tape recordings.

Recommendation No. 4

The nature and extent of "executive privilege" should be carefully defined and circumscribed by statute. Further, steps should be taken to eliminate employment or other techniques of nondisclosure of information by the executive branch.

Discussion: "Executive privilege" as a technique of nondisclosure by the executive after congressional requests for data has been thoroughly studied in recent years by the Subcommittee on Separation of Powers of the Senate's Committee on the Judiciary and by an Ad Hoc Committee of the Senate's Government Operations Committee. There is no present need to repeat what has been said there, nor to repeat the conclusions of the Report of the Subcommittee on Separation of Powers. Suffice it to say that the Select Committee, having experienced repeated refusals by the president both to testify before the committee and to produce relevant documents and other evidence, considers it vitally necessary that legislation be enacted that will carefully delimit the nature and extent of the exercise of executive privilege. The committee believes that the privilege is available only to the president and only as to communications with and by him to his personal

advisors and by his personal advisors among themselves. Further, it believes that the privilege is available only with respect to the *official* duties of the chief executive. It therefore recommends that legislation be enacted to limit the use of executive privilege in those respects.

That legislation, when promulgated, would not impinge upon the necessary confidentiality of the office of the presidency. It would preserve secrecy when secrecy is required. That can only be in the conduct of *official* business. Further, it would make it impossible, by requiring the president to invoke the privilege personally, for all save a few high officials within the executive branch to utilize it.

The committee is also aware, from a study made by the Senate's Separation of Powers Subcommittee, that numerous other techniques are employed by the executive so as to deny necessary and relevant information to Congress and, at times, to prevent appearance of witnesses. The net conclusion of this study, to be published as a committee print, is that executive privilege is not merely *one* of the executive's techniques of avoiding providing information to Congress—it is one of the least used. Many other devices effectively isolate Congress from data and witnesses to which it is entitled. The time is long past for legislation to be enacted that will eliminate all types of nondisclosure of information requested by Congress from the executive.

Recommendation No. 5

Immediate steps should be taken by Congress to improve its institutional capability to obtain, store, assimilate, retrieve, and use complex data on public policy issues from diverse sources.

Discussion: A major reason for the flow of governmental power toward the executive is the inability of Congress, both collectively and individually, to deal effectively with large amounts of data covering the entire spectrum of public policy issues with which it deals. An imbalance in institutional capabilities vis-à-vis the executive is only too apparent. Congress does not have the requisite physical plant, manpower, professional staff, services, and overall resources to enable it to operate in an increasingly complex governmental environment.

These deficiencies relate directly to the Watergate events, particularly to the failure of Congress adequately to oversee the public administration (or to establish other organizations to do so). Future Watergates may be impossible either to foresee or to prevent, but surely it is accurate to maintain that the risk of another concatenation of circumstance like Watergate would be substantially reduced if Congress became physically and structurally more able to perform the day-to-day

oversight of the public administration, including the executive offices of the presidency, that is so necessary. Rep. Richard Bolling, chairman of the House Select Committee on Committees, aptly stated in February, 1974:

If there is a lesson in Watergate, it is not that we had a President who was either blind or willful—but that there was nobody watching. We cannot have a system which depends on a benign executive—or a malign one. We've got to make the Congress work; there is no alternative. And if the Congress cannot be responsible, then the whole system of representative government and free choice government is going down the drain.

The basic problem facing Congress in this respect is less that of the members *wanting* to monitor the executive branch than it is of their *ability* to do so. Without resources necessary for the task, it becomes impossible—a futile gesture, a mere charade, an empty shell.

That the Congress has the constitutional power to effect such oversight cannot be doubted. Three basic means are employed: legislative, investigative, and financial. In each activity, there are manifest shortcomings in numbers of staff and adequacy of plant. All of this is a thrice told tale, requiring no present restatement. It is enough to note that the Congressional Research Service of the Library of Congress, the General Accounting Office, and the professional staffs of the committees and subcommittees, all of which perform valuable services, are not in and of themselves sufficient to the need. Congress must reform itself so as to live in the last part of the twentieth century. As matters now stand, it resembles more a nineteenth century institution than one attuned to the needs of the modern age and the emergent future. A vehicle for modernizing Congress may be found in the Legislative Reorganization Act of 1970, which established the Joint Committee on Congressional Operations with the duty to:

make a continuing study of Congressional organization and operation; and to recommend improvements designed to strengthen Congress, simplify its operations, improve its relationships with other branches of the United States Government, and enable it better to meet responsibilities under the Constitution.

Among the irreducible needs for modernizing Congress are the following:

1. *Widespread use of computer technology.* In this connection, it is noteworthy that the Select Committee scored a technological breakthrough by being the first congressional committee to use a computer to store data. Testimony that use of a computer and microfilm storage bank could serve Congress in other activities came from a num-

ber of sources. For example, Senator J.W. Fulbright stated in a letter to the chairman:

I hope you will consider, in addition to the important substantive issues with which you are concerned, including a section (in the Select Committee's report) on methodology—specifically, the manner in which the Committee handled the masses of data which it accumulated in the course of its investigation.

I raise this point because I am increasingly impressed with the difficulties which Congress faces in this respect, particularly as compared to the enormous capabilities of the executive branch. The problem is steadily becoming more serious in the Foreign Relations Committee.

You must have faced the same problem in the Select Committee. Judging from the efficient manner in which the Committee organized and presented voluminous data, you must have solved the problem.

In another letter to the chairman, Senator Frank Church stated:

Let me cite only three examples from the experience of the Subcommittee on Multinational Corporations. Last year the subcommittee sent a detailed questionnaire to more than 50 of the largest corporations seeking information on international currency transactions, a subject of prime importance with respect to which there is little or no information. We have not yet been able to compile the results of that Questionnaire and finally had to resort to a contract with a private firm.

The subcommittee has also distributed a questionnaire to an even larger number of corporations seeking data on operations and investment decisions in Latin America. We are having to rely on the good offices of a university in order to analyze the replies.

Finally, the subcommittee's recent hearings on international oil companies involved the laborious sorting through of something more than 30 file drawers of documentation. It is a tribute to the subcommittee's staff that this was done as well as it was, but it took a great many man-hours and I am still not sure that something was not overlooked

In short, the subcommittee's inquiry would have been greatly facilitated if the subcommittee had modern techniques at its disposal. Obviously, the Select Committee on Presidential Campaign Activities did have such techniques at its disposal or it could not have handled such masses of data as efficiently as it did.

I hope that in preparing your report you will consider making recommendations as to how . . . Congress as a whole might better equip itself to deal with a problem of growing importance. It is a problem which must be solved if Congress is to face the executive branch and the private sector on anything like an equal footing.

The Select Committee recommends that the Joint Committee on Congressional Operations urgently consider the effective use of computer technology.

2. *More professional staff.* There can be little dispute over the need for more highly trained professionals to augment the staffs of congressional committees and subcommittees. The Congress should not hesitate to appropriate such funds as are necessary for this. Included should be lawyers and economists, as well as other social and behavioral scientists, plus those with expertise in science and technology.

3. *Use of professional staff as "legislative hearing examiners" to conduct much, but not all, of the hearings of the several committees and subcommittees.* The need for this flows from the obvious fact that a single member of Congress is expected to be knowledgeable on matters covering the entire executive branch (as well as outside of it). Equally obviously, no single senator or representative can become expert in all aspects of the matters on which he must vote—or even on those which the committees of which he is a member considers. A corps of highly professional "legislative hearing examiners" would go far toward rectifying imbalances in expertise between Congress and the executive.

4. *An "institute" for Congress.* In addition to the foregoing, a need exists for Congress to have a permanent outside source on which it can draw for objective analyses of major public issues, review of proposals advocated by the executive, and that, further, would suggest problems to which the Congress should be attentive and publish studies that would be available to the entire Congress. In short, a congressional "think tank" is required. *The Select Committee recommends that its establishment be made a matter of first priority.*

Recommendation No. 6

Legislation should be enacted requiring all "wiretaps" and other electronic surveillance, to have prior judicial approval.

Discussion: During the Select Committee's hearings, it became manifest, particularly during the testimony of such White House officers as John Ehrlichman, that a theory of inherent presidential powers was being employed to accomplish a number of objectives of the most dubious legality. Often, as with the burglary of Dr. Fielding's office, they were obviously illegal. Colloquy between the Select Committee's Chairman and Mr. John Wilson, attorney for Mr. Ehrlichman, revealed that reliance was being placed upon *United States v. United States District Court*, 407 U. S. 297 (1972) (the "wiretap case"), as a source of presidential power. It is, of course, clear beyond peradventure that

the Court in that decision firmly rejected the government's claim that warrantless electronic searches in domestic security cases were a reasonable exercise of presidential power. Justice Lewis Powell's opinion for a unanimous Supreme Court concluded that "prior judicial approval is required" for domestic security surveillance. The issue arose in a case in which the attorney general had authorized wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government."

The Court said that although the Fourth Amendment's requirement of a warrant before a search is not an absolute, the prior judgment of an independent magistrate is the norm. "Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances may be conducted solely within the discretion of the executive branch." Although Justice Powell carefully limited his opinion to "the domestic aspects of national security" and expressed no opinion on "the issues which may be involved with respect to activities of foreign powers or their agents," he did state (with respect to the issue of domestic security): "Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. . . . *Judges may be counted upon to be especially conscious of security requirements in national security cases.*" (Emphasis added). (*But see Laird v. Tatum*, 408 U. S. 1 (1972), in which the Supreme Court, 5-4, failed to find a "justiciable" controversy so as to permit a decision on the merits of the Army's surveillance of civilian political activity.)

From the fact that the Court left unanswered the question of whether warrants are necessary with respect to foreign intelligence and in light of *Laird v. Tatum*, it is clear that Congress should address itself to the question of whether prior judicial approval should be required for *all* wiretaps and other electronic surveillance, as well as for other types of surveillance. The Select Committee so recommends. In the wiretap case, *supra*, Justice Powell suggested that "Congress may wish to consider protective standards (for foreign intelligence wiretaps) which differ from those already prescribed for specified crimes in Title III (of the 1968 Crime Control Act). Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of government for intelligence information and the protected rights of our citizens."

The Supreme Court has not ruled on the issue of foreign intelligence not involving American citizens. At least two courts of appeals,

however, have held that such surveillance does not violate the Fourth Amendment. See *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). There is no reason to prohibit the executive from conducting such surveillance. Since, however, American citizens may at times be (inadvertently) involved, there seems to be no valid reason why a warrant should not be obtained prior to the wiretap. Congress should take cognizance of Justice Powell's invitation in the wiretap case and address itself to the question.

Legislation should establish procedures permitting the courts under designated standards to authorize surveillance of foreign powers. The basic standard that could be employed is whether there is reason to believe that information of importance to the nation's security would be obtained.

To obviate possible disclosure of such activities, Congress could establish special procedures to be followed. This could be done easily and effectively by a provision that all such warrants be issued by a single judge—perhaps the chief judge of the United States district courts in the District of Columbia. Staff work could be performed by the Department of Justice, so that only the judge himself need see the material and the warrant. And special procedures should be established to protect the rights of American citizens who might be overheard. *In net, the need is for prior judicial approval under guidelines that will protect national security.*

There is no constitutional barrier to such legislation. The ultimate power under the Constitution is that of Congress; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). As Justice White said in his concurring opinion in the wiretap case, "the United States does not claim that Congress is powerless to require warrants for surveillance which the President otherwise would not be barred by the Fourth Amendment from undertaking without a warrant." The wiretap case is a direct holding by the Supreme Court that Congress can limit the executive's power to tap without a warrant. In a footnote to Justice White's opinion, he indicates that the Justice Department, speaking through Assistant Attorney General Robert Mardian, accepted the view that Congress did have such power.

The changes in existing law recommended by the Select Committee could be accomplished by two steps: (a) striking section 2511(3) of the Omnibus Crime Bill, thus making all warrantless national security wiretaps illegal; and (b) drafting a new section establishing procedures for taps on foreign powers and foreign nationals in their employ. The

further recommendation of the Select Committee is for legislation to "reverse" the Court's decision in *Laird v. Tatum*, the Army surveillance case.

Recommendation No. 7

Legislation should be enacted that all presidential rules whether by proclamation, executive order, or any other label, be submitted to the Congress for its scrutiny before going into effect. Further, that no such rule shall become effective unless approved by both houses of Congress by affirmative votes.

Discussion: It is impossible to determine how many executive orders and proclamations, having the effect of law, have been issued since the beginnings of the republic. The first attempt to systematize the process of executive lawmaking came in 1907, when a numbering system was established. That chaotic situation was bad enough when the federal government had relatively few tasks to perform—in, that is, the pre-1933 era. Beginning in 1933, however, the bureaucracy greatly expanded and the number of executive orders took an exponential leap. As the Senate's Special Committee on Termination of the National Emergency put it in early 1974, ". . . the National Recovery Administration (in two years) disseminated its regulations in the form of 5991 press releases constituting in all over 10,000 pages of 'law.'"

The situation became intolerable, leading Congress in 1935 to pass the Federal Register Act. This statute requires publication in the *Federal Register* of all executive orders and proclamations, as well as other documents. But the act did not specify which executive directives had to be issued as executive orders or proclamations. Furthermore, there was no requirement that international executive agreements, whether entered into pursuant to a preexisting statute or treaty or pursuant to pure presidential authority, be published. It was not until 1972 that Congress enacted a statute requiring that it be informed of all such agreements.

It is evident that the manner in which executive orders and proclamations are issued is still in a chaotic state. This permits, as the Senate Special Committee on Termination of the National Emergency said, excessive discretion in presidential lawmaking. Said the committee:

If the format and procedures for issuing Executive Orders and proclamations appear inadequate and inconsistent, the situation regarding other Executive directives is even more so, bordering on the chaotic. Title 3 of the *Code of Federal Regulations* indicates that in issuing decisions and commands, Presidents have used such diverse forms as letters, memorandums, directives, notices, reorganization plans, administrative designation, and military orders.

The decision whether to publish an Executive decision is clearly a result of the President's own discretion rather than any prescription of law. In recent years, the National Security Action Memorandums of Presidents Kennedy and Johnson and the National Security Action Directives of President Nixon represent a new method for promulgating decisions, in areas of the gravest importance. Such decisions are not specifically required by law to be published in any register, even in a classified form; none have prescribed formats or procedures; none of these vital Executive decisions are revealed to Congress or the public except under irregular, arbitrary or accidental circumstances. For instance, the secret bombing of Cambodia has recently come before congressional and public notice. The public record reveals very little about how the commands for such far reaching actions were issued. What is most disturbing is the lack of access to any authoritative records in these matters. In short, there is no formal accountability for the most crucial Executive decisions affecting the lives of citizens and the freedom of individuals and institutions.

The problem is exacerbated by the classification of sensitive or important Executive decisions, classification which in most cases prevents even Congress from having access to these documents. While no one would wish to prevent sensitive documents from being classified for reasonable cause, the absolute discretion given to the Executive in this area has led to abuse. It has permitted and encouraged inclusion in this category of many documents in no way connected with essential national security. Moreover, not only are their contents kept secret, but even the extent of such documents is unascertainable. On the basis of the handling of past Presidential papers, many of these documents will, of course, in one manner or another, eventually be declassified, but many have been withheld by Executive discretion.

Until recently, classified Executive Orders were inserted chronologically in the prescribed serialization of the *Federal Register* by the use of a letter suffix after the number of the last preceding order, for example, Executive Order 7784-A. It seems evident that even this provision for recording classified Executive directives has, by and large, not been used because other less public forms of Executive directives have proven more convenient.

The legal record of executive decisionmaking has thus continued to be closed from the light of public or congressional scrutiny through the use of classified procedures which withhold necessary documents from Congress by failure to establish substantive criteria for publication and by bypassing existing standards. As a result, the legality of a substantial area of operations of the Government has in large measure been immune from any oversight or scrutiny by Congress. And the situation is growing worse. The number of formal Executive Orders and Proclamations has, in recent years, declined from many hundreds to about 70 annually. *Since it is certain that as the United States has grown in size and power that the Executive is issuing more and more decisions, many of which are of the greatest importance, it can only be surmised that such commands continue to be issued in irregular form and in ways un-*

accountable to Congress and the people. As the role of the Executive in Government continues to expand, this must be cause for the greatest concern. (Emphasis added)

This matter is exacerbated because the president, at his own discretion and without any congressional oversight, has assumed the power to declare that a state of national emergency exists. (The nation, for example, has been under a state of presidentially declared national emergency since 1950.) There are more than 470 statutes permitting the president to exercise emergency powers. These statutes, almost without exception, provide no standards at all to limit presidential authority. Nor is there any requirement that the state of emergency be of limited duration. Says the Special Committee:

Thus, whenever the President so decides, he may legitimately establish a Government rule not subject to many normal congressional checks. The Constitution and especially the Bill of Rights still provide significant restraints, but the institutional checks designed to protect the guarantees of the Constitution and Bill of Rights are significantly weakened by the growing tendency to give the President the grants of extraordinary power without provision for effective congressional oversight, or without any limitation upon the duration such awesome powers may be used.

The conclusion is unavoidable that steps must be taken to curb presidential lawmaking. To that end, the Select Committee recommends enactment of a statute that will require the submission of every presidential order or directive, by whatever name called, to be submitted to the Congress prior to its promulgation. The Select Committee further recommends that no such order or directive be allowed to have the effect of law until both houses of Congress approve it by majority vote. Inasmuch as there may well be hundreds or even thousands of such orders and directives promulgated in a given year, Congress could establish a means by which some office—for example the General Accounting Office or, if established, the Office of Congressional Counsel (see Recommendation No. 3 above)—could be delegated the responsibility for receiving and approving the routine orders and directives. Congress could then devote itself to consideration of only those of the greatest importance or impact.

Recommendation No. 8

Congress should undertake an immediate, comprehensive analysis and examination of the executive offices of the presidency in order to determine whether its organization fulfills basic constitutional principles.

Discussion: A clear inference to be drawn from the volumes of testimony heard by the Select Committee, as well as additional evi-

dence available, indicates that the institutionalized office of the presidency has swollen to mammoth proportions. A structure which as recently as President Franklin D. Roosevelt was designed to provide the president with staff assistance and advice has been gradually transformed into an instrument of control. More and more the executive branch of government is hierarchically organized, with controls in increasing degree over the departments and agencies (and even, at times, over the so-called independent regulatory commissions). Power is being centralized in the White House and its immediate environs to an extent unknown in history. As Bryce N. Harlow, an assistant to President Nixon, once said, "Richard Nixon is running the whole government from the White House." (Quoted from HUGHES, *THE LIVING PRESIDENCY* 344 (1973).)

Personal advisers have been converted from *presidential assistants* to *assistant presidents*, who govern without any external controls on their actions. They are accountable to no one and are elected by no one; the Senate does not confirm them, their actions are not judicially reviewable, they invoke "executive privilege" and otherwise refuse to deal with Congress—they in short act as a "government within a government." As assistant presidents, they exercise enormous power—taken in the name of the president but often, it seems, without his acquiescence or even his knowledge. In 1939, when the executive offices of the presidency were created, it was emphasized that the assistants to the president "would not be assistant presidents in any sense" and "would remain in the background, issue no orders, make no decisions, emit no public statements." President Roosevelt's Executive Order 8248, issued September 8, 1939, which is still in effect, states in part: "In no event shall the administrative assistants be interposed between the President and the head of any department or agency or any one of the divisions in the Executive Office of the President."

How far the nation has strayed from that principle was starkly revealed in the testimony of such witnesses as H. R. Haldeman, John Ehrlichman, John Dean, L. Patrick Gray, and General Vernon Walters. The Select Committee recognizes the need for an adequate presidential staff, but believes that its basic structure and philosophy must be restudied by Congress to determine the extent to which basic constitutional and statutory principles are being fulfilled. At the very least, the concept of "assistant presidents"—a situation which, the committee notes, antedated the Nixon administration—must be thoroughly examined. For too long, to cite one example, effective control over the conduct of foreign relations rested with close advisers to Presidents

Kennedy, Johnson, and Nixon—at the expense of the Department of State, the cabinet department established by Congress to conduct foreign affairs. Furthermore, the committee believes that the principle of Executive Order 8248, set forth above, should be enacted into statute. If that is done, assistants to the president would soon cease to be assistant presidents—but they would not be precluded from carrying out necessary liaison activities.

Since the Select Committee had neither the time nor the resources to accomplish the necessary in-depth study of the executive offices of the presidency, it is limiting its recommendation to pointing out the urgent necessity of immediate congressional action to do that task and to make appropriate legislative recommendations. The study can be done either by Congress itself or, perhaps more appropriately, by a special study commission with carefully defined duties and responsibilities.

Recommendation No. 9

Legislation should be enacted, similar to the “conflict of interest” laws, under which no executive officer may become an officer of the national committee of any political party or of any organization established to further the reelection of the president.

Discussion: Little discussion is necessary to demonstrate the need for legislation such as this. The former attorney general, John N. Mitchell, moved directly from that office to head the Committee to Re-elect the President. In so doing, he could not have avoided taking with him the trappings, and much of the power and influence, of the attorney general's office. His relations with former colleagues in the Department of Justice made it obvious that the appearance of justice, in the activities of the department, was seriously jeopardized. The same, in a somewhat different way, may be said for Maurice Stans, who moved from secretary of commerce to head of the Finance Committee to Re-elect the President.

Conflict of interest statutes now in the United States Code prevent a government employee, civilian or military, from using the knowledge that he gained while in government for a certain period after leaving the government. The same principle should be invoked with respect to high government officials becoming officers in political campaigns. A two-year waiting period would seem to be reasonable.

Furthermore, the question of the use of employees within the executive offices of the presidency—for example, Charles Colson, devoting their time to reelecting the president, while on the government

payroll, raises serious questions of propriety. If public financing of election campaigns is not recommended by the Select Committee, then it must, if it is to be consistent, also recommend legislation prohibiting *any* member of the federal government, other than the president and vice-president, from devoting *any* on-the-job time to election matters. The committee notes the pending lawsuit, *Public Citizen v. Schultz* on the question, of whether the salaries of E.O.P. employees were validly paid to those who worked on the election campaign of President Nixon. Whatever the outcome of that litigation, it is manifest that the principle or spirit of the Hatch Act should be applied to *all* government employees other than the president and vice-president.

Recommendation No. 10

Recommendations for legislative action made in this report should be periodically monitored by both houses of Congress until such time as they all have been thoroughly considered.

Discussion: The report of the Select Committee is lengthy. It contains many recommendations. Most of these require more study, particularly as to their details, before they can be put into effect. The committee proffers the recommendations in the expectation that the appropriate committees of both houses of Congress will place them on their agenda for early study and for congressional action as soon as possible. Continuing monitoring is considered necessary in order that the specific recommendations will, as soon as practicable, receive the careful attention of the Congress. None of the foregoing recommendations requires a constitutional amendment; all can be put into effect by statute. That makes the task immeasurably easier.

Conclusion

This part of the committee's report has been devoted to "systemic" recommendations—those that touch and concern some of the larger implications of Watergate. The essential problem in 1974 is the same as it was in 1787, when the Constitution was drafted: How to cabin the exercise of governmental power (to make it "accountable") while at the same time permitting the urgent tasks of government to be accomplished. Because of the many additional tasks and responsibilities of government (noted above), this problem has become even more difficult than in the past to assess and resolve.

It is manifest that the imbalance of power that has developed by slow accretion over the decades must be readjusted. There can be no question about the need for strong leadership by the executive branch;

but equally, there can be no question that Congress should take a number of steps immediately to effect that readjustment. The recommendations listed in this chapter are not necessarily complete. Quite possibly, others will become apparent, particularly if the relevant committees of both houses of Congress address themselves to scrutinizing the recommendations herein with care and dispatch.

Little time—not nearly enough time—is available for that effort. But it must be made, and soon, else presidential government will be here to stay—both in fact (as it is now) and in theory. Constitutions are not static documents; they are living instruments of government. As Woodrow Wilson put it, they follow Darwinian rather than Newtonian principles. American government—the constitutional order itself—has been basically altered in the less than two centuries since 1787—by amendment, by Supreme Court interpretation, by congressional action, and by custom and usage. We delude ourselves if we believe that the principles enunciated by the founding fathers do not change in content through time.

Those changes are readily apparent in the rise of executive hegemony in the federal government, a process that has found the Congress, speaking generally, a ready ally. It is time now to stop that development, to turn it aside by reasserting the legislative prerogative in those situations where it should be exercised—and simultaneously permitting the president to exercise necessary leadership.

A reevaluation of the constitutional order would, ideally, be accomplished through means of a constitutional convention. That, however, is neither desirable nor feasible. Happily, the same results can be reached if Congress, acting as a collegial body, would take the minimum steps listed above to modernize itself and to become, once again, a coequal partner engaged in awesome task of governing the most powerful nation in the world's history.

Appendix

If the tortuous activities of the Committee on the Judiciary of the House of Representatives prove anything, it is that the constitutional remedy of impeachment is ill-suited to the exigencies of modern times. The time is long past for the American people to face up to the question of constitutional amendment to provide for the removal of presidents from office.

In this century alone, at least four, and perhaps six or even seven, chief executives should have left office before the ends of their terms.

Four completely lost the confidence of the people: Herbert Hoover, Harry Truman, Lyndon Johnson, and (as this is written) Richard Nixon. Woodrow Wilson was physically incompetent during the last several months of this second term; and Warren Harding completely lacked competence. The possible seventh is Dwight Eisenhower, after his two illnesses.

That is a bad record for any office, let alone that of the single most powerful human being in the world. The clear inference is that some way other than impeachment is a prime requirement for good government in this age. Can we any longer engage in the slow, cumbersome, divisive and traumatic process of impeachment? Hardly. The world moves on with accelerating speed, and all the while we indulge ourselves in ancient constitutional procedures. Impeachment is an eighteenth-century minuet, a slow and stately exercise that is out of place in the mad pace of the last part of the twentieth century.

Resignation, of course, is possible, as is the halfway-house of temporary disability (under the Twenty-Fifth Amendment). But neither process fits the need. The former is wholly voluntary; the latter both voluntary and mandatory. But who, when the mandatory provisions of the Twenty-Fifth Amendment are invoked, will bell the cat?

The search for a feasible alternative must acknowledge at the outset that this country, as are all major governments today, is dominated by the executive. Americans have presidential government in fact, whatever the Constitution says or implies or whatever the Supreme Court or Congress has said. The problem is not to eliminate presidential leadership, but to cabin it—to make it accountable. Needed, in other words, is a means by which necessary political power can be kept within reasonable boundaries.

Separation of powers, the answer of the founding fathers to that problem, no longer suffices. The Congress cannot and, indeed, it will not govern. It has, quite happily and willingly, acquiesced in the process by which power has flowed to the presidency. The net result is an office that puts far too much power *in one person*. No other major nation in the world, not even totalitarian nations such as the USSR, so concentrate political power.

Barbara Tuchman has suggested pluralizing the presidency into six different executives. But that is hardly feasible or desirable. If adopted, the necessary leadership of a single chief executive would be lost. Michael Novak, quite properly in my judgment, has called atten-

tion to the problems that arise when, as in the American Constitution, one person is both head of state and head of government. That should be changed, but will not be (within the foreseeable future).

A better solution has been proposed by Rep. Henry Reuss (D. Wis.). In February, 1974, he introduced a resolution (H.J. Res. 903) calling for an amendment to establish a "no confidence" vote on the president alone. If three-fifths of each house votes no confidence then the president would step down and the vice-president would act as chief executive until a special election was held.

Difficulties of course are present in the Reuss proposal. One involves the lack of identified standards by which no-confidence votes could be held. Certainly such a vote could not come on every bill considered by Congress. However, those standards could presumably be worked out in congressional hearings on the resolution, accompanied by public debate. No thoughtful person would wish for a president to leave office for blindly partisan or trivial reasons.

Mr. Reuss limits his resolution to the president alone, justifying the failure to encompass a true parliamentary system by saying that members of Congress must face such a vote every two years (for the House of Representatives, plus one-third of the Senate). That may well be a weakness; but on the other hand, it may be a means for the proposal to get serious consideration in Congress.

Those who might say that the Reuss proposal would result in a weakened presidency fail to note that it has been fifty years since Great Britain removed a prime minister from office on a vote of no confidence. The fact that President Nixon, at the nadir of his power, has prevailed in all except one of his recent vetoes (those since Water-gate), is ample testimony to the great power of the office.

The merits in the Reuss proposal are obvious. There would be no trauma of impeachment. A president could be removed from office without having to define an "impeachable offense". And presidents who have in fact lost the confidence of the electorate would no longer be in office; as said above, this country has a bad track record in this century on its chief executives. Further, adoption of the Reuss proposal should result in at least a partial resurrection of congressional powers, without making this a government by legislature. Congress would, in all probability, be forced to reorganize itself.

Impeachment, which for the British in the Middle Ages was the chief institution for the preservation of the government, has degenerated in the United States into a seldom-used blunderbuss. It is *not*

an instrument to effect badly needed accountability upon those who govern us. To adopt the Reuss proposal is not to tinker with the Constitution, but to improve it. A vote of no-confidence is no panacea; it would merely be an improvement.